



**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

(petitioner)

DECISION

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MRA-70/51194

**PRELIMINARY RECITALS**

Pursuant to a petition filed November 14, 2001, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Winnebago County Dept. of Social Services in regard to Medical Assistance (MA), a hearing was held on December 19, 2001, at Neenah, Wisconsin. The record was held open for 20 days for the submission of additional information.

The issue for determination is whether petitioner is eligible for an increase in the Community Spouse Asset Share in order to generate income to reach the Minimum Monthly Maintenance Needs Allowance.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

(petitioner)

c/o Atty Benjamin Adams  
301 Nicolet Blvd  
Neenah, WI 54956

Respondent:

Wisconsin Department of Health and Family Services  
Division of Health Care Financing  
1 West Wilson Street, Room 250  
P.O. Box 309  
Madison, WI 53707-0309

By: Mary Beth Gehrke, ESS  
Winnebago County Dept Of Human Services  
220 Washington Ave.  
PO Box 2925  
Oshkosh, WI 54903-2925

**ADMINISTRATIVE LAW JUDGE:**

Kenneth P Adler  
Division of Hearings and Appeals

### **FINDINGS OF FACT**

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Winnebago County.
2. On October 31, 2001 petitioner filed an application for nursing home MA under Spousal Impoverishment provisions. Petitioner sought backdating of eligibility to August 2001.
3. Petitioner was institutionalized on August 2, 2001.
4. During August 2001 petitioner's assets totaled approximately \$237,956. Exhibit 4
5. Petitioner's spouse resides in the community. Her monthly income is \$279 Social Security plus \$1,199.87 interest from several assets. Petitioner's income was \$721 Social Security plus \$254 in interest from several assets. Exhibit 5
6. The county set the community spouse asset share (CSAS) at \$87,000. That determination allowed the couple to keep combined assets of \$89,000. The community spouse income allocation (Minimum Monthly Maintenance Needs Allowance – MMMNA) was set at \$2,175 per month. Exhibit 2
7. In September the community spouse moved to a community living facility with an increase in monthly shelter expenses. Therefore the MMMNA was increased to \$2,175 effective October 1, 2001.
8. As of August 2001 the couple's assets totaled \$237,956.07 - all in interest bearing accounts and investment assets. Total monthly income from the assets was approximately \$1,199.87. Exhibit 4
9. On November 12, 2001 a notice of decision was issued stating MA was denied as assets exceeded the allowable limit. Exhibit 2

### **DISCUSSION**

The federal Medicaid Catastrophic Coverage Act of 1988 (MCAA) included extensive changes in state Medicaid (MA) eligibility determinations related to spousal impoverishment. In such cases an "institutionalized spouse" resides in a nursing home or in the community pursuant to MA Waiver eligibility, and that person has a "community spouse" who is not institutionalized or eligible for MA Waiver services. Wis. Stat. §49.455(1).

The MCCA established a new "minimum monthly maintenance needs allowance" (MMMNA) for the community spouse at a specified percentage of the federal poverty line. This amount is the amount of income considered necessary to maintain the community spouse in the community. After the institutionalized spouse is found eligible, the community spouse may, however, prove through the fair hearing process that he or she has financial need above the MMMNA based upon exceptional circumstances resulting in financial duress. Wis. Stat. §49.455(4)(a).

When initially determining whether an institutionalized spouse is eligible for MA, county agencies are required to review the combined assets of the institutionalized spouse and the community spouse. MA Handbook, Appendix 23.4.0. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial are exempt from the determination. The couple's total non-exempt assets then are compared to the "asset allowance" to determine eligibility.

The county determined that the current asset allowance for this couple is \$89,000. See the MA Handbook, App. 23.4.2, which is based upon Wis. Stat. §49.455(6)(b). This figure combines the \$2,000 MA asset limit for the institutionalized individual and the community spouse asset share of \$87,000. If the couple's assets are at or below the determined asset limit, the institutionalized spouse is eligible for MA. If the assets exceed the above amount, as a general rule the spouse is not MA eligible.

As an exception to this general rule, assets above the allowance may be retained as determined through the fair hearing process, if income-producing assets exceeding the asset limit are necessary to raise the community spouse's monthly income to the MMMNA. The MMMNA in this case is \$1,935 for the months of August and September. MA Handbook, Appendix 23.6.0. Effective October 2001 the MMMNA increased to \$2,175.

Wis. Stat. §49.455(6)(b)3 explains this process, and subsection (8)(d) provides in relevant part as follows:

If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department shall establish an amount to be used under sub. (6)(b)3 that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c).

Based upon the above, an administrative law judge can override the mandated asset allowance by determining assets in excess of the allowance are necessary to generate income up to the MMMNA for the community spouse. Therefore, the above provision has been interpreted to grant an administrative law judge the authority to determine an applicant eligible for MA even if a spousal impoverishment application was initially denied based upon the fact the combined assets of the couple exceeded the spousal impoverishment asset limit.

Subsection (8)(d) quoted above includes a final sentence that requires the institutionalized spouse to make his or her income available to the community spouse before the assets are allocated. However, the Wisconsin Court of Appeals, in Blumer v. DHFS, 2000 WI App 150, 237 Wis. 2d 810, 615 N.W. 2d 647, concluded that the final sentence violated the mandate of the federal MCCA law. The Blumer court held that the administrative law judge must first allocate resources to maximize the community spouse's income, and only if the resource income does not bring the community spouse's income up to the MMMNA can the institutionalized spouse's income be allocated. The Blumer decision was appealed to the Wisconsin supreme court which denied the request for review. The case was accepted by Supreme Court of the United States and heard on oral argument in October 2001. As no decision has yet been issued, the Wisconsin Court of Appeals decision is currently the law that must be followed.

The result in this case is as follows. Petitioner seeks MA coverage retroactive to August 1, 2001. At that time assets totaled approximately \$237,956. The monthly income attributable to those assets was \$1,199.87. The MMMNA was \$1,935 for August and September. Effective October 1, 2001 the MMMNA increased to \$2,175 based upon increased shelter expenses due to the community spouse changing her residence to a community facility attached to the nursing home where petitioner resides. The community spouse had monthly income of \$279. Under the Blumer case all income from assets must first be allocated to the community spouse before she is able to seek income directly from petitioner.

Combining the community spouse's income of \$279 plus income from assets of \$1,199.87 provides monthly income of \$1,478.87. The community spouse remains \$456.13 below the MMMNA of \$1,935 (\$1,935 - \$1,478.87) for August and September. Therefore, for the months of August and September the community spouse is eligible for an income allocation of \$456.13 from petitioner's monthly income of \$721. The remainder of petitioner's income (\$721 - \$456.13 = \$264.87) should have been applied against his cost of care.

For October forward the community spouse is eligible for an additional income allocation of \$240 from petitioner to meet the higher MMMNA applicable beginning in October (\$2,175 - \$1,935 = \$240). The

remainder of petitioner's income (\$264.87 - \$240 = \$24.87) should have been applied against his cost of care.

### **CONCLUSIONS OF LAW**

1. That the community spouse be allowed to retain all assets to raise her monthly income to the MMMNA retroactive to August 1, 2001.
2. That \$456.13 of petitioner's income must be allocated to his wife for the months of August and September 2001.
3. That petitioner has cost of care/nursing home liability of \$209.64 for the months of August and September 2001.
4. That \$696.13 of petitioner's income must be allocated to his wife beginning effective October 2001 forward.
5. That effective October 2001 forward petitioner has a cost of care/nursing home liability of \$24.87.

**NOW, THEREFORE, it is**

### **ORDERED**

*That the matter be remanded with the following instructions: (1) increase the community spouse asset share to \$237,956.07 effective August 1, 2001; (2) for the months of August and September 2001 allocate \$456.13 of petitioner's income to the community spouse; (3) for the months beginning October 2001 allocate \$696.13 of petitioner's income to the community spouse; and (4) certify petitioner eligible for MA effective August 1, 2001. The agency shall take these actions within ten (10) days of the date of this decision.*

### **REQUEST FOR A NEW HEARING**

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, , as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of  
Madison, Wisconsin, this 12th day of  
February, 2002

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/s/Kenneth P Adler  
Administrative Law Judge  
Division of Hearings and Appeals  
315/KPA